

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America,

Plaintiff,

v.

Case No. 07-20556

Maurice Smyers,

Honorable Sean F. Cox

Defendant.

**ORDER NOTIFYING DEFENDANT OF RECHARACTERIZATION AND DIRECTING
DEFENDANT TO FILE MEMORANDUM**

Defendant Maurice Smyers (“Defendant”) pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). This Court sentenced Defendant on November 10, 2008. Defendant did not file a direct appeal.

Acting *pro se*, on October 21, 2009, Defendant filed a “Motion for Concurrent Time Credits” wherein he appears to ask this Court to vacate this sentence and re-sentence him.

Although Defendant’s motion does not cite the legal authority under which he asks this Court to vacate his sentence, the relief requested is consistent with a motion to vacate sentence under 28 U.S.C. § 2255 and is therefore the equivalent of a petition under § 2255. Before characterizing Defendant’s motion as a § 2255 motion, however, Defendant must be given the opportunity to withdraw the filing. *See In re Shelton*, 295 F.3d 620, 622 (6th Cir. 2002). This is because “[a]n unintended byproduct of [liberally construing *pro se* filings as § 2255 petitions] . . . is that it may effectively deprive an uninformed *pro se* litigant of the future opportunity to file a motion to vacate his sentence under § 2255.” *Id.* at 621. After a prisoner files one motion under

§ 2255, the Antiterrorism and Effective Death Penalty Act generally prevents a prisoner from filing a second or successive § 2255 motion. Thus, the prisoners must be aware that the Court's construction of their petition may limit their ability to pursue future avenues of collateral relief and must be given the opportunity to either agree with the Court's construction or withdraw their motion.

Accordingly, **Defendant is hereby NOTIFIED that the Court intends to construe his October 21, 2009 motion as a motion for relief under 28 U.S.C. § 2255.**

Defendant is DIRECTED to file a one-page memorandum on or before **April 23, 2010**, indicating whether he agrees with the Court's intended characterization of his October 21, 2009 motion or whether he intends to withdraw his motion. In the event that Defendant does not file a memorandum on or before April 23, 2010, his motion will be deemed a motion under § 2255.

IT IS SO ORDERED.

S/Sean F. Cox

Sean F. Cox

United States District Judge

Dated: March 24, 2010

I hereby certify that on March 24, 2010, a copy of the foregoing document was served upon counsel of record via electronic means and upon Maurice Smyers, via First Class Mail at the address below:

Maurice Smyers #41766-039
Federal Detention Center
Box 1000
Milan, MI 48150

S/Jennifer Hernandez

Case Manager